January 29, 2001

Ms. Myrna S. Reingold
Galveston County
4127 Shearn Moody Plaza
123 Rosenberg
Galveston, Texas 77550-1454

OR2001-0335

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 143653.

The Galveston County Beach and Parks Department (the "department") received a request for all information relating to the dismissal of the requestor from employment with the department. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. Alternatively, you claim that some of the requested information is not public information subject to disclosure under the Act. We have considered the exceptions you claim and reviewed the submitted information.

We first address your claim that some of the requested information is not subject to the Act. You state that notes taken by a department supervisor during employee interviews conducted as a part of an employee investigation are not public information under the Act. The Act defines "public information" as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . by a governmental body[.]" Gov't Code § 552.002(a)(1). In support of your argument, you quote from *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000), which states, in part, that "the mere creation of a draft is not transacting official business." *Id.* You argue that if, according to *City of Garland*, the mere creation of a draft is not transacting official business, then the creation of notes during employee interviews is also not transacting official business. However, a closer inspection of the court's ruling in *City of Garland*

reveals that it cannot be broadly interpreted, as you suggest, to hold that any drafts or notes created by a governmental body are not subject to the Act. The court's actual holding is much narrower:

> [W]e hold that a document, even if labeled "draft," is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained by or for a governmental body. . . . It follows that a draft document that is not collected, assembled, or maintained by or for a governmental body under a law or ordinance or in connection with transacting official business is not public information. For example, the mere creation of a draft is not transacting official business. *But if the draft document is used in connection with transacting official business, then the draft document becomes public information. To allow a governmental body to exempt otherwise public documents from the Act simply by labeling or calling them "drafts" would invite governmental bodies to circumvent the Act's purpose of broad public access to governmental information.*

City of Garland, 22 S.W.3d at 359 (emphasis added). Thus, according to *City of Garland*, any draft or notes that are used in connection with transacting official business are subject to the Act. Here, you indicate that the notes in question were taken by department supervisors as part of an internal investigation into the conduct of a department employee. Investigations of personnel matters are certainly the official business of the department. As such, we believe that the interview notes were taken in connection with the transaction of official business and are therefore public information under the Act. Having resolved the question of the interview notes, we next address your claimed exceptions to disclosure.

You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the department must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that, at the time of the request, litigation was realistically contemplated and was more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

In this instance, you indicate that the dismissed employee made several verbal threats to department personnel indicating that he intended to sue the department, listed the reason for his termination on an exit interview form as "wrongful termination," and filed a request for a grievance hearing with the Galveston County Legal Department on the morning of November 2, 2000. He then submitted his request for information in the afternoon of that same day.

The requestor's public threats to sue the department and his listing "wrongful termination" on his exit interview form do not indicate that objective steps toward actually filing suit were taken. *See* Open Records Decision No. 331 (1982) (mere threats of litigation insufficient to substantiate claim under section 552.103). In addition, unlike filing a complaint with the

EEOC, the act of filing a request for a grievance hearing with the county is not an objective step taken towards litigation. *See, e.g.*, Open Records Decision No. 336 (1982). Based on these facts, we believe that litigation was not reasonably anticipated at the time of the request.

We also note that a grievance hearing with the County of Galveston (the "county") does not amount to "litigation" for purposes of section 552.103. This office has held that "litigation" for purposes of section 552.103 includes contested cases conducted in a quasi-judicial forum. For example, this office has held that contested cases conducted under the Administrative Procedure Act ("APA"), chapter 2001 of the Government Code, are considered litigation under section 552.103. *See* Open Records Decision No. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). Here, the grievance proceeding with the county is established in chapter 16 of the county's Personnel Policy Manual. Under this policy, grievants may be represented by a union representative or an attorney. Grievants may present arguments to a three-member grievance panel at a grievance hearing, which is generally held 30 days after the grievance is filed. Presentations at the hearing are limited to 45 minutes for the grievant and 45 minutes for management. The grievant and the department head are permitted to present documentary evidence and the testimony of witnesses at the hearing. However, no cross-examination of witnesses is permitted. In addition, the county's grievance rules are silent as to procedural rights to discovery and the method of presenting of evidence. Considering the informality of these grievance procedures, we do not believe that a grievance hearing conducted by the county amounts to "litigation" for purposes of section 552.103. Thus, litigation was not actually pending at the time of the request. Therefore, you may not withhold the submitted information under section 552.103.

You also claim that some of the requested information is "other work product" that is protected from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 647 (1996), this office held that a governmental body may withhold "attorney work product" from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. However, the decision in Open Records Decision No. 647 pre-dated the Texas Supreme Court's 1999 amendments to the Texas Rules of Civil Procedure, which separated work product privilege into two distinct categories: 1) "core work product," and 2) "other work product." *See* Tex. R. Civ. P. 192.5(b).[1] We note that, in order to claim the work-product privilege, the governmental body must demonstrate that the materials were created for trial or in anticipation of civil litigation. In this instance, you failed to demonstrate that, at the time the documents at issue

[1]The Office of the Attorney General is currently reevaluating Open Records Decision No. 647 in Open Records Question No. 41.

were created, the department reasonably anticipated litigation. Therefore, you may not withhold the requested information under section 552.111 in conjunction with the work-product privilege.

In summary, the interview notes are public information under the Act because they were taken in connection with the transaction of official business. You may not withhold any of the requested information under section 552.103 or section 552.111 because you have failed to demonstrate that the department reasonably anticipated litigation. Because you have not demonstrated that any of the Act's exceptions apply, you must release all of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Stephen P. Agan
Assistant Attorney General
Open Records Division

SPA/seg

Ref: ID# 143653

Encl. Submitted documents

cc: Mr. Chris John Mallios
1804 Flamingo
League City, Texas 77573
(w/o enclosures)